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05609-1001

July 18, 2004

Paula DiStabile, Esq., Executive Director
Vermont Board of Medical Practice
P.O. Box 70
Burlington, VT 05402-0070

Re: *In re: David S. Chase*
Dk. Nos. MPS 15-0203, MPC 110-0803, MPC 208-1003, MPC 163-0803, MPC 148-0803
MPC 126-0803, MPC 106-0803, MPC 209-1003, MPC 140-0803,
MPC 89-0703, MPC 122-0803, MPC 90-0703, MPC 87-0703.

Dear Paula:

The State is in receipt of Respondent's letter of July 12, 2004 requesting a continuance of the hearing scheduled in the above-referenced matters for August 2, 2004. The State views the Respondent's request as an attempt to further delay these proceedings under the guise of efficiency. The State therefore opposes the continuance for the reasons set forth below.

Respondent's Pending Motion to Dismiss

Respondent first argues that resolution of his pending motion to dismiss may avoid the necessity for a hearing if the motion is resolved in his favor. However, the Respondent's pending motion is without merit as a matter of law. As the State has previously argued in this case, the Board is without statutory authority to dismiss charges. Unlike a court, which possesses the authority both in law and equity to dismiss cases, the Board can only exercise those powers specifically granted to it by the Legislature. Nowhere in the Board's enabling legislation is the authority to dismiss charges.

In the alternative, Respondent argues that if his pending motion is dismissed he must have time to "double-check the accuracy and completeness of all of the State's prior document production." Respondent refuses to accept the very limited

parameters of document production in this administrative process and persists in his attempts to insinuate the discovery rules of civil proceedings into the Board's procedures. As he has throughout the case, Respondent exaggerates to distortion both the State's obligations to produce documents and Respondent's entitlement to such documents.

The Board rules and enabling legislation allow Respondent access to all the information in the Board's possession (Board Rule 19.1) and to examine the documentary evidence that may be produced against him (26 V.S.A. §1357). In other words there is no obligation on the part of the Board or the State (two separate entities in these proceedings that the Respondent persistently and mistakenly merges as one) to copy documents and provide them to the Respondent. Since the filing of the Motion for Summary Suspension almost a year ago, Respondent has had the opportunity, and has taken the opportunity, to examine the documents allowed by the Board rules and statutes. The Attorney General's office assured the Respondent in writing many months ago that he had all non-privileged documents in the State's possession. The Respondent has received documents in excess of that required by rule or statute. The issue of alleged problems with the State's document production is illusory and a transparent attempt to delay the proceedings.

Waivers from Patient Witnesses

Respondent next argues that a continuance is required in order to address the issue of patient witnesses who have refused to grant to Respondent a general waiver of their privacy rights with respect to medical records. As with Respondent's pending motion to dismiss, this issue is ethereal and is raised only as means of delaying the proceedings. There is no foundation for Respondent's assertion that he is entitled to unfettered access to the medical records of those patients who were willing to come forward and file complaints against the Respondent.

More fundamentally, there is no basis for the argument that a patient's refusal to grant the Respondent such unfettered access to medical records results in the exclusion of their testimony at an administrative disciplinary hearing. Such a result is tantamount to a dismissal of the charges based on that patient's refusal to waive. As the State has previously argued, the Board does not have the statutory authority to dismiss the charges.

More importantly, if Respondent were to prevail on such an argument, the public interest (which the Board is charged with protecting) will be severely compromised. Patients will be unwilling to file complaints with the Board if the price of filing a complaint that leads to charges is allowing the physician complained against unfettered access to private medical records--records it should be pointed out that the physician did not deem necessary in the treatment of the patient.

A final aspect of the patient-waiver issue that supports a denial of the continuance is the timing. Respondent first raised this issue with the State last year. In the meantime, Respondent could have circulated the request for waiver to the patients and join the issue much sooner than two weeks before the hearing. Instead, Respondent has waited until the depositions of the witnesses to make the request. The only purpose served by the Respondent's approach to this issue is to delay raising the issue and therefore delay the proceedings.

Parallel Proceedings

The third argument raised by Respondent to support the request for continuance is the argument most disturbing to the State. Respondent asserts that a continuance is necessary in order for the Superior Court to resolve an issue of scope of representation of the putative class in a civil proceeding against Respondent. Respondent argues that he cannot contact members of the putative class and thus Respondent's ability to prepare for hearing is "significantly impede[d]." This argument is disturbing on several levels.

Once again there is the issue of timing. If these patients were so important to the preparation of Respondent's case why did he wait so long to speak with them? If he has spoken with these patients then how does the issue in Superior Court impact the disciplinary hearing. Respondent can arrange with plaintiffs' counsel to have the witnesses at hearing or, if necessary, subpoena the witnesses to hearing.

Another question the Board should consider with respect to this argument is why these witnesses, which Respondent considers so important to his case, are even relevant to a hearing on the merits. The State has charged that in thirteen cases, Respondent engaged in unprofessional conduct. The experiences of those thirteen patients combined with the experiences of numerous members of Respondent's staff provide the basis for the State's allegations that Respondent engaged in a pattern or practice of unprofessional conduct. The State *has not* alleged that every patient of Respondent was the subject of unprofessional conduct. The fact that other patients did not have an experience with Respondent that they considered unprofessional has no relevancy to the experiences of the thirteen patients that form the basis of the Superseding Specification of Charges.

However, the most important reason the Board must reject this argument as a basis for a continuance is that the Board cannot allow parallel proceedings involving the Respondent to impede the progress of the Medical Board cases. If the Board allows parallel proceedings to influence its handling of the Board cases, the potential for delay and further motions for continuances is endless.

For example, what will Respondent's position be if prior to the hearing, the Superior Court decides the pending motion against Respondent or if the Superior Court grants class certification? Respondent does not discuss either of these likely scenarios in his requesting a continuance. Yet if either scenario occurs, Respondent

will be in the same situation he is in now. Will Respondent then ask for another continuance, or a stay, or even a dismissal on the basis that he cannot speak with witnesses whose relevancy is questionable? These are the types of issues that will arise if the Board begins to allow parallel proceedings to influence its decision-making.

In addition, the civil action against Respondent is not the only parallel proceeding involving the Respondent. The Board must keep in mind the Respondent's revelation to the Board in his first motion to dismiss that he is the subject of a criminal investigation. If the Board begins to allow issues in parallel proceedings to impact the progress of the Board's proceedings, Respondent may very well seek to stay or even dismiss the Board proceeding if the investigation results in criminal charges. If the Board begins to fuse the civil and criminal proceedings into its proceedings, the Board will become enmeshed in a procedural tangle from which it will never extricate itself.

Partial Dismissal Based on Deposition Testimony Allegedly Inconsistent with the State's Allegations

Respondent's fourth argument is that the continuance will allow time for the Respondent to file a motion to dismiss certain charges because, Respondent asserts, the deposition testimony of some patient-witnesses is at odds with the allegations in the Superceding Specification of Charges. This argument is meritless for two reasons. First, as has been previously argued, the Board does not have the statutory authority to dismiss charges.

Second, whether the State can muster the evidentiary support for the allegations in the Superceding Specification of Charges is a matter to be determined at hearing after the Board has the opportunity to take live testimony and assess the credibility of all the witnesses. Even if the Board had the statutory authority to dismiss charges it could not do so on the basis put forth by the Respondent.

Contrary to the assertions of the Respondent these motions would not save time and resources but further expend both needlessly. The State will vigorously contest any such motions filed by Respondent thereby increasing the issues that have to be resolved before hearing and causing further delay in the proceedings.

Stipulation to Exhibits and Utilization of Pre-filed Written Testimony

As to Respondent's final basis for continuance, the State has no objection to considering stipulating to certain exhibits but does not believe a continuance is necessary to accomplish this. The State is uncertain as to what "pre-filed written testimony" the Respondent is referring to but will certainly consider any proposal from Respondent that would expedite the hearing without prejudicing the State's case.

Continuance Will Not Serve the Public Interest

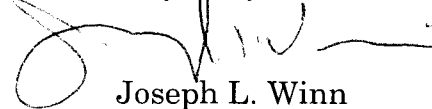
The major reason the Board should not consider a continuance in these matters is that a continuance does not serve the public interest. The public has a right to expect an expeditious resolution to matters involving professional licensure. Such expectation is heightened when the allegations of unprofessional conduct are as egregious as those present in these cases. Of course that expedited process must comport with due process. However, due process only requires that Respondent receive notice of the charges against him and opportunity for hearing where he can present and cross-examine witnesses. The State has provided the former and wishes desperately to provide the latter. Neither due process nor the Vermont Administrative Procedures Act contemplates the extensive discovery and types of pre-hearing formalities in which the Respondent has engaged and which he is now proposing in his request for continuance.

To allow the type of protracted process that has occurred in these proceedings to continue undermines the public's confidence in the Board's ability to address important matters of medical licensure in an expeditious matter. Moreover, a continuance in these matters will cause the complaining patients and other State witnesses in this case undue frustration and inconvenience that will dampen their resolve to cooperate with the State. The State has already requested its witnesses to be available during the first two weeks of August. Constant scheduling and rescheduling will create enormous complications and increased frustration for the State's witnesses.

Finally, a continuance will have a profound negative effect on patients who may be contemplating filing complaints against other physicians. If potential complainants see that their complaints, especially complaints that may lead to charges, will only make them subject to an extensive litigious process that is going to consume an inordinate amount of their time, they are going to be unlikely to file complaints. The Board needs patient involvement to do its job. Prolonging the process only serves to diminish a patient's incentive to become involved.

The Respondent's request for a continuance must be denied.

Yours very truly,

A handwritten signature in dark ink, appearing to read "J. Winn", with a large, stylized initial "J" and a horizontal flourish extending to the right.

Joseph L. Winn
Assistant Attorney General

cc: Eric Miller, Esq. (via fx & mail)